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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCOS SOLORIO et al.,

Defendants and Appellants.

B208023

(Los Angeles County  
Super. Ct. No. KA078856)

APPEAL from judgments of the Superior Court of Los Angeles County.

Robert M. Martinez, Judge. Affirmed.

Tara K. Hoveland, under appointment by the Court of Appeal, for Defendant and Appellant Joseph Richard Gonzalez.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant Marcos Solorio.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Marcos Solorio, also known as Marcos Avalos, and Joseph Richard Gonzalez appeal from the judgments entered upon their convictions by jury of second degree robbery (Pen. Code, §§ 211, count 1)<sup>1</sup> and three counts of attempted murder (§§ 664, 187, counts 2-4). As to each count, the jury also found to be true as to each appellant that a principal used, discharged or proximately caused great bodily injury with a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), (c) and (e)(1), and (d) and (e)(1), that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1) and, as to Gonzalez, that he personally used or discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c) and (d). The trial court found that Gonzalez had suffered two prior prison terms within the meaning of section 667.5, subdivision (b). It sentenced Solorio and Gonzalez to aggregate prison terms of 86 years eight months to life and 103 years four months to life, respectively. Appellants contend that (1) there is insufficient evidence to support the gang allegation. Solorio also contends that (2) there is insufficient evidence to support his convictions of attempted murder. He joins the contentions of Gonzalez to the extent applicable to him. (Cal. Rules of Court, rule 8.200(a)(5); see *People v. Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5.)

We affirm.

## **FACTUAL BACKGROUND**

### **The prosecution's evidence**

#### ***The charged incident***

We review the record in accordance with the usual rules on appeal. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) On April 16, 2007, in the early afternoon, appellants picked up Ismael Zaragoza in a car driven by Gonzalez. Appellants were members of the Olive Street gang. Solorio's moniker was "Bandit," and Gonzalez's moniker was "P-Dog." Zaragoza was younger than the two gang members and was

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

considering joining their gang. He got into the back seat of the car. According to Zaragoza, Gonzalez then gave him a .22-caliber rifle and told him to hold it.<sup>2</sup> Neither Solorio nor Gonzalez explained why Zaragoza was given the rifle.

After cruising around in the car for several hours, the three men stopped at Elias Bermudez's house and got out of the car. Gonzalez told Zaragoza to bring the rifle, and Solorio was aware that Zaragoza did so. Zaragoza hid the rifle under his clothing. The three men talked with Bermudez until Gonzalez said that they should take a walk.

After walking several blocks, appellants, Zaragoza and Bermudez came upon Randy Garnica, David Valles, and Regina Rosales, whom they did not know. As they approached, Bermudez made a disparaging remark to his associates about the "12th Street" gang, a rival of the Olive Street gang. Solorio said that he was going to "jack that fool [Garnica] for his hat." When they got near the individuals, Solorio said he was "Bandit" from Olive Street gang and wanted Garnica's hat and neck chain. To avoid "problems," Garnica told Solorio to take them, which Solorio did. Gonzalez told Zaragoza to take out the gun, which Zaragoza did and pointed it at Garnica.<sup>3</sup>

Someone in appellants' group asked what gang the individuals were from. Garnica said he was not in a gang. When Valles answered, "PMR," the initials for the Pomona Michoacanos Rifa gang, and began moving away, Gonzalez told Zaragoza to shoot him. Solorio said nothing about shooting. Zaragoza could not bring himself to shoot. Gonzalez grabbed the rifle and shot at Valles five times and Garnica once. Rosales, who was in the yard nearby, was also shot. The victims suffered significant wounds, but all survived. Solorio acted surprised when the shooting began and ran.

The morning after the shooting, officers encountered Zaragoza in a park in possession of Garnica's hat, which he claimed had been given to him by Bermudez earlier that morning. While in jail, Zaragoza received a letter with Solorio's name and

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<sup>2</sup> Zaragoza first testified that "they," meaning appellants, gave him the rifle. When pressed as to who "actually gave it" to him, he initially said Solorio.

<sup>3</sup> Garnica testified that as Solorio was taking Garnica's hat and chain, Solorio turned around and gave a signal to his partner to pull out the gun.

address on it, but unsigned, telling him not to say anything because if he did, “You know what [will] happen.”

On April 19, 2007, officers participated in a traffic stop of a car driven by Gonzalez. A search of the car uncovered Garnica’s silver neck chain. Gonzalez claimed he did not know how it got there.

### ***Gang evidence***

Detective Michael Lange testified as a gang expert that the Olive Street gang’s main activities included vandalism, narcotics and weapons related crimes, assaults, robberies, murders, attempted murders and witness intimidation. He testified regarding three convictions of violent crimes in 2006 by Olive Street gang members. The 12th Street gang and its affiliate gang, PMR, were Olive Street gang’s rivals. The charged incident took place just east of Olive Street gang’s territory. Based upon their tattoos and Gonzalez’s known association with members of that gang, Detective Lange opined that Solorio and Gonzalez were active Olive Street gang members.

Detective Lange testified to gang culture. He explained that a gang associate could become a gang member by being “jumped in” or “put[ting] in work” for the gang through the commission of gang crimes. Gangs operate based on respect, fear, intimidation, and retaliation. People who cooperate with police are “snitches” and subject to retaliation. The phrase, “Where are you from?” is used exclusively in the gang community as a challenge.

In response to a hypothetical question based upon the facts in evidence, Detective Lange opined that the charged robbery and shootings were committed for the benefit of the Olive Street gang and the individual members who committed those crimes. He explained that gang members travel in groups for protection from rivals, and older gang members commonly give their weapons to younger gang members who usually do not have criminal records and “take the fall” for gang crimes committed by the group. A robbery and shooting in the community benefits the gang member by enhancing his status in the gang and benefits the gang by increasing its reputation for violence in the community. Fear, intimidation and the threat of retaliation are methods of control by the

gang. When Valles turned to leave after saying he was from PMR he was disrespecting Solorio and the Olive Street gang.

Detective Lange also indicated that even if unplanned, it was common for gang members to have confrontations that escalate into violence, and gang members are aware of this. When a gang member moves about as part of a gang knowing a weapon is present, he knows the weapon can come out at any time and that a gang member is expected to support and participate in any ensuing action. Gang members arm themselves in anticipation of encountering rivals. In the hypothetical presented, none of the gang members tried to stop the gang member who announced he was going to take the victim's hat. As gang members, they were expected to participate, carry a weapon, take part in the robbery or serve as a lookout. If they did not, they would be disciplined by the gang.

### **The defenses' case**

Gonzalez, a convicted felon, testified on his own behalf that he was not in Pomona at the time of the shootings. He did not know how the silver chain got into the back seat of the car he was driving when arrested, but the day before his arrest, he gave Zaragoza and another friend a ride.

Gonzalez's brother testified that Gonzalez was house sitting for him in Rialto at the time of the shooting.

## **DISCUSSION**

### **I. Sufficiency of evidence to support Solorio's attempted murder convictions**

Solorio was convicted of one count of robbery and three counts of attempted murder. He contends that there is insufficient evidence to support his attempted murder convictions. He argues that because he was not the shooter, he could only be culpable as an aider and abettor, and there is no evidence he knew Gonzalez intended to use the rifle to shoot the victims or that he did anything to facilitate, promote or encourage the shootings. He further argues that his mere presence at the crime scene is insufficient. We find no merit in these contentions.

“In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry, supra*, 37 Cal.App.4th at p. 358.) “[T]he appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” [Citation.] This standard applies whether direct or circumstantial evidence is involved.” (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) Reversal is unwarranted unless “upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” (*People v. Bolin, supra*, at p. 331.)

“All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed.” (§ 31.) A person is liable for aiding and abetting when, (1) with knowledge of the unlawful purpose of the perpetrator and (2) with the intent or purpose of committing, or encouraging, or facilitating the commission of the crime, that person (3) by act or advice aids, promotes, encourages, or instigates the commission of the crime. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 386.) Whether a person is an aider and abettor may be shown by circumstantial evidence (see *People v. Gutierrez* (2009) 45 Cal.4th 789, 824) and is ordinarily a question of fact for the trier of fact (*People v. Herrera* (1970) 6 Cal.App.3d 846, 852).

“A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime.” (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133.) The question is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable. (*Ibid.*) Liability under the probable

consequences doctrine is dependent on whether a reasonable person in the defendant's position would have, or should have, known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.)

There was ample evidence that Solorio was guilty of the attempted murders as an aider and abettor. A reasonable person in his position would or should have known that the shootings were the foreseeable, natural and probable consequences of the confrontation with the victims. Appellants were Olive Street gang members, and Zaragoza was considering joining the gang. One way for him to become a member was to "put in work" by committing crimes for the gang. Solorio was in the car when Zaragoza was given a rifle to hold in the back seat, as they cruised the area for hours. When they got out of the car at Bermudez's house, Solorio knew Zaragoza took the rifle with him at Gonzalez's instruction. As explained by the People's gang expert, when gang members go somewhere and one of them is carrying a weapon, they all know that the weapon "can come out at any time." Anyone traveling with armed gang members is prepared for an encounter and groups of gang members use their numbers as a show of force.

When appellants' group was approaching the victims, it was Solorio who set in motion the events that led to the shootings. He stated that he was going to "jack that fool for his hat." Bermudez made a disparaging remark about the 12th Street gang, an affiliate of the PMR gang and a rival of the Olive Street gang. When appellants first made contact with the victims, the victims were asked where they were from. This was not a mere exchange of pleasantries in gang parlance, but, as explained by the gang expert, it was a common gang expression constituting a challenge. It was Solorio who declared that he was "Bandit" from the Olive Street gang and robbed Garnica of his hat and neck chain, at the same time as the rifle was displayed.

While mere presence at the scene of the crime is insufficient to establish one as an aider and abettor (*People v. Luna* (1956) 140 Cal.App.2d 662, 664), it is a circumstance to be considered along with the accused's companionship and conduct before and after

the offense (*People v. Laster* (1971) 18 Cal.App.3d 381, 388). Here there was more than mere presence. Solorio was affiliated with Gonzalez as a fellow gang member. He knew that Zaragoza had a rifle. He issued a gang challenge to a member of a rival gang, knowing, as the expert explained, that Solorio and his fellow gang members were to participate in whatever transpired. These facts made the shooting of the victims a natural and probable consequence of the confrontation and robbery by Solorio. (See *People v. Medina* (2009) 46 Cal.4th 913, 921–924.) The likelihood that Solorio’s actions would lead to an escalation could be reasonably anticipated. The primary actor need not expressly communicate his criminal purpose to the defendant, as that purpose may be apparent from the circumstances. (*People v. Nguyen, supra*, 21 Cal.App.4th at pp. 531–532.) “[I]n the gang context, it was not necessary for there to have been a prior discussion of or agreement to a shooting, or for a gang member to have known a fellow gang member was in fact armed.” (*People v. Medina, supra*, at p. 924.)

Furthermore, there was evidence that Solorio was instrumental in involving the gun in the confrontation. Garnica testified, contradicting his other testimony, that when robbing Garnica, Solorio turned and signaled Zaragoza to take out the gun.

## **II. Sufficiency of evidence to support gang enhancement**

The jury found that appellants committed the charged offenses for the benefit of a criminal street gang. Appellants contend that there is insufficient evidence to support that allegation. Solorio argues that “there was insufficient evidence that the instant offenses were committed with the required specific intent to ‘promote, further or assist in any criminal conduct by gang members’ and further that the above intent was apart from the current conviction.” Gonzalez argues that there was insufficient evidence “to corroborate the gang expert’s conclusory testimony that the crimes here were committed for the benefit of the Olive Street Gang and with the specific intent to promote the criminal street gang.” These contentions are without merit.

We review the sufficiency of the evidence to support a sentence enhancement under the same standard applicable to a conviction, as set forth in part I, *ante*. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)



Section 186.22, subdivision (b)(1) provides that a person convicted of a felony committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” can receive an enhanced sentence. It applies to gang-related crimes. (*People v. Castenada* (2000) 23 Cal.4th 743, 745.)

Examples of gang-related crimes include crimes directed at members of rival gangs, where a gang sign is flashed and the attacker’s gang name is yelled (see *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1463), and shootings precipitated by crossing out gang graffiti and shouting out a gang name. (See *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382–1383.) Similar indicia of a gang-related offense was in evidence here, amply supporting the jury’s finding that the charged offenses were committed for the benefit of the Olive Street gang with the specific intent to promote, further or assist in any criminal conduct of its members.

Based on hypothetical facts derived from the evidence, the qualified gang expert opined that the offenses were committed for the benefit of the Olive Street gang. This opinion was amply corroborated by other evidence. The offenses were among the very types that the gang expert testified were the Olive Street gang’s main activities. The perpetrators included appellants, two hardcore members of that gang, and Zaragoza, who was considering joining. The shooting occurred after Bermudez made a disparaging comment about the rival “12th Street” gang, an affiliate of PMR, in which Valles was a member, and appellants declared their membership in the Olive Street gang.

The shooting began after Valles declared his membership in the rival gang and began walking away, a sign of disrespect to Solorio and the Olive Street gang. The gang expert opined that a shooting under these circumstances is for the benefit of the gang because it is in retaliation for Valles’s disrespect and induces fear, solidifies gang control and enhances the gang’s reputation to its rivals and the community. The gang expert testified that participation of an Olive Street gang member in a shooting of a PMR member would benefit Olive Street by enhancing its “respect.” “It was for the jury to assess the weight of that testimony in the first instance, and since we believe a ‘rational

juror' could have been convinced by it, we cannot deem it insufficient.” (See *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1384.)

For similar reasons, the evidence supports the finding that Solorio had the “specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1)). He walked down the street with another known gang member and a “wannabe” carrying a rifle at Gonzalez’s direction. Knowing this, and as the gang expert testified, aware of the likelihood that the weapon would be used, Solorio committed a robbery on a group that included a rival gang member, after a gang challenge was made. This evidence supports the conclusion that he intended to promote the shooting, which he was aware was likely to result under these circumstances. It can be inferred that one intends the natural consequences of one’s actions. As stated in *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322, “As to the second prong of the enhancement, all that is required is a specific intent ‘to promote, further, or assist in any criminal conduct by gang members.’ [Citation.] Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime.”

Appellants reliance on *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank S.*) is misplaced. In that case, the Court of Appeal was presented with a claim that there was insufficient evidence that a minor, stopped for a traffic violation on his bicycle carrying a dagger, was carrying the dagger for the benefit of the gang with “the specific intent to promote, further, or assist criminal gang behavior.” (*Id.* at pp. 1194–1195.) It reversed the gang enhancement for insufficient evidence because “[t]he prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense. . . . [¶] . . . [A]ppellant’s criminal history and gang affiliations cannot solely support a finding that a crime is gang-related under section 186.22.” (*Id.* at p. 1199.) The Court of Appeal faulted the trial court for permitting the use of such expert testimony as proof of

appellant's specific intent in the case (*ibid.*), which ran afoul of the rule in *Killebrew*<sup>4</sup> that an expert may not properly testify to the defendant's subjective knowledge and intent. (*Frank S.*, *supra*, at pp. 1197–1198.)

Unlike in *Frank S.*, appellant's intention here to promote, further or assist in criminal conduct by gang members is not established solely by his gang affiliation and criminal record but by a record replete with facts establishing his knowledge of what was likely to transpire and his initiation and participation in what was clearly a gang endeavor.

Relying on *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103, appellants argue that the intent to promote, further or assist in any criminal conduct by gang members, refers to an intent to do so in criminal conduct of the gang apart from the instant conviction. The Third Appellate District and our Second Appellate District Courts of Appeal have rejected *Garcia*'s interpretation of section 186.22, subdivision (b)(1). (*People v. Hill* (2006) 142 Cal.App.4th 770, 774; *People v. Romero* (2006) 140 Cal.App.4th 15, 19.) We agree with these cases. As Justice Epstein explained in *Romero*: “By its plain language, the statute requires a showing of specific intent to promote, further, or assist in ‘any criminal conduct by gang members,’ rather than *other* criminal conduct.” (*People v. Romero*, *supra*, at p. 19.) Because there was evidence that the crime was committed with other gang members after making a gang challenge in rival gang territory, we are satisfied the evidence is sufficient to support the conclusion that appellants intended to assist criminal conduct by fellow gang members.

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<sup>4</sup> *People v. Killebrew* (2002) 103 Cal.App.4th 644, 652–659.

**DISPOSITION**

The judgments are affirmed.

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\_\_\_\_\_, Acting P. J.

DOI TODD

We concur:

\_\_\_\_\_, J.

ASHMANN-GERST

\_\_\_\_\_, J.

CHAVEZ